SEEMA DEVELOPMENT SDN. BHD.

v.

FAH KIN PANG & ORS.

HIGH COURT MALAYA, IPOH
ABDUL HAMID EMBONG JC
[CIVIL APPEAL NO: 23-404-86 & 23-405-86]
2 MAY 1996

LEGAL PROFESSION: *Solicitor's authority to act for challenge - Oral challenge - Whether sufficient evidence to support oral challenge to summarily adjudicate - Desirable to determine issue on application of party by motion as summons - Whether lawyers who act as solicitors for clients - Term 'Counsel' - Whether refers to both an advocate and solicitor*

LEGAL PROFESSION: *Term 'Counsel' - Whether refers to both an advocate and solicitor - Legal Profession Act 1976 - Ratification whether act done by solicitors without proper authority can be ratified by plaintiff - Present authority - Whether has retrospective effect to acts done by solicitor before action was filed appearance of Counsel in Court - Whether presumed to be regular and beyond reproach - Counsel's standing in Court*

In the midst of the joint trial of two suits and after two witnesses had testified for the plaintiff, learned Counsel for the defendant made an oral application to strike out both the suits for lack of authority of Counsel for the plaintiff. The first witness for the plaintiff in this case, was the plaintiff's managing director.

Held:

[1] There was insufficient evidence to support the oral challenge of the defendant's Counsel on the lack of authority of the plaintiff's Counsel for the Court to summarily adjudicate on it. However, the proceedings were stayed and the defendant's Counsel was ordered to take up challenge by a notice of motion which was duly filed by the defendant.

[2] In our fused legal profession, lawyers who act as solicitors also appear as Counsels for their clients when the need arises. The term 'Counsel' refers to an advocate and solicitor in the context of the Legal Profession Act 1976 and Rules made thereunder.

[3] The Court will, unless otherwise proven, assume that a Counsel is so authorised to appear in Court to represent a party to the proceedings. His appearance must therefore, at first instance, be presumed to be regular and beyond reproach.

[4] It is settled law that the plaintiff may ratify the act of its solicitor and give further instruction at any time although such ratification is not applicable restrospectively to acts done by a solicitor before the action was filed.

[Defendant's application to strike out suits dismissed; oral application to defer trial pending outcome of appeal refused; and order for trial to proceed.]

Cases referred to:

William Jacks & Co. (M) Sdn. Bhd. v. Chemquip (M) Sdn. Bhd. & Anor. [1991] 1 CLJ 184; [1991] 2 MLJ 555 ***(refd)***

Danish Mercantile Co. Ltd. and Ors. v. Beaumont and Anor. [1951] 1 Ch. 680 ***(refd)***

Syawal Enterprise Sdn. Bhd. v. Dayadiri Sdn. Bhd. [1990] 3 MLJ 239 ***(refd)***

Other sources referred to:

Halsbury's Laws of England, 4th Edn. Reissue, Vol. 3(1), para. 517

Halsbury's Laws of England, 4th Edn. Reissue, para. 131

For the plaintiff - Yeow Khoon Kwong; M/s. Yeow & Co.

For the defendant - David Chai; M/s. Woo Yew Choe & Co.

JUDGMENT

Abdul Hamid Embong JC:

On 8 August 1996, in the midst of the joint trial of these suits and after having heard the testimonies of two witnesses for the plaintiff, David Chai, learned Counsel for the defendant, made an oral application to strike out both suits for lack of authority of K.K. Yeow, Counsel for the plaintiff and the first witness, its managing director (SP1), to act for plaintiff.

On the authority of *William Jacks & Co. (M) Sdn. Bhd. v. Chemquip (M) Sdn. Bhd. & Anor* [1991] 1 CLJ 184; [1991] 2 MLJ 555, that such an oral challenge may be made at any time, I stayed the proceedings, and ordered that this challenge be taken up by a notice of motion, which was duly filed by the defendant, *vide* encl. 39, on 20 January 1996, and argued in open Court on 18 April 1996. I was not satisfied that there was sufficient evidence to support the oral challenge, which would have allowed me to summarily adjudicate on it. In that case, Gunn Chit Tuan SCJ, for the Supreme Court held that:

> Although the various *dicta* in the authorities as to the methods open to a defendant to contest the authority to bring an action are not altogether easy to reconcile or understand, we would agree that a challenge to the authority of solicitors may be made at any time and the Court in its inherent jurisdiction may entertain the challenge made orally and may order the action to be struck off if there was sufficient or admitted evidence that there is no action properly before it. But when there is no such evidence, the Court should only stay the proceedings and determine the issue of want of authority on the application of a party by motion or summons.

In his affidavit in support of the application, the defendant predictably dropped the issue of lack of authority of the managing director. Abandoning this ground seems to me, to be a correct move by the defendant since it would have been futile for him to pursue it. It is clear that both suits are brought in the name of the plaintiff company itself, and surely its managing director is one who is not only authorised but competent to speak on its behalf. Furthermore, in the course of cross examination of this witness, there was no challenge by the defendant as regards his lack of authority.

The main ground for this challenge, as deposed to by the defendant in encl. 38, is two-fold in that, firstly, the original solicitor for the plaintiff who instituted these summons on 27 September 1986, i.e. Syarikat A.M. Ong, is not properly authorised by a resolution made by the plaintiff, and secondly, that Yeow, now appearing as plaintiff's Counsel, is in effect authorised merely to act as its solicitor, and not to conduct the prosecution of its case.

In its affidavit in reply (encl. 40), it was deposed by SP1, on behalf of the plaintiff, that an extraordinary general meeting of the plaintiff company was held on 30 January 1996, resolving on two matters pertaining to the issue at hand, and I quote:

Appointment and Discharge of Solicitors

1. **Resolved** that the appointment of Syarikat A.M. Ong Advocates & Solicitors as Solicitors for the company for the purpose of the commencement of Ipoh High Court Civil Suits No. 23-404-86 and 23-405-86 for the relief claimed for therein and the said suits be and is hereby ratified, approved and adopted by the company.

2. **Resolved** that the appointment of M/s. Yeow & Co. Advocates & Solicitors as solicitors for the company in Ipoh High Court Civil Suits No. 23-404-86 & 23-405-86 in place of Syarikat A.M. Ong Advocates & Solicitors for the purpose of the conduct and prosecution of the said suits for the plaintiff be and is hereby approved, ratified and adopted by the company.

These resolutions by the plaintiff are clearly an approval and ratification of the earlier employment of the solicitors authorising them to act on its behalf.

On the same date, 30 January 1996, the plaintiff also resolved, by circular, pursuant to its articles, to replace its former solicitor with M/s. Yeow and Co., and to approve the current solicitor to proceed with the 'conduct and prosecution of these suits.'

Learned Counsel for the defendant challenger, argued that the resolutions passed on 30 January 1996 are irregular. He submitted that since the plaintiff is wholly owned by another company *viz.* Seema Enterprises, the directors who approved the resolutions are merely acting as nominees of that sole shareholder. Thus, he said, only Seema Enterprises could ratify the appointments. With respect, I see no merit in this argument. The plaintiff, even though wholly owned by another company, is clearly a separate legal entity with its own board of directors. (see exh. KPH1 to encl. 40). It is this board that acts as the limbs and mind of the plaintiff. To say that only its sole shareholder, Seema Enterprises, is authorised to ratify, would be contrary to our common understanding of the principles governing an incorporated entity's operations. It may well be that the plaintiff's directors are in fact nominees of and connected to Seema Enterprises, but as directors of the plaintiff, they are separate from and act independently of Seema Enterprises. The resolutions are in my view regular.

Next, it was alleged that no meeting was actually convened on 30 January 1996. This argument was grounded on the fact that, subsequent to the meeting, the plaintiff's board of directors passed another resolution by circulation, on the very same day, an act according to Counsel, unnecessary, if there had in fact been a meeting held on that date. I also find no flaw here. It is well within the right of the plaintiff to pass a resolution either at a convened meeting or *vide* a circular, pursuant to its articles, para. 108, which reads -

> A resolution in writing signed by all the directors for the time being present in West Malaysia shall be as valid and effectual as if it had been passed at a meeting of the board duly called and constituted and may consist of several documents in like form each signed by one or more of the directors.

The written circular resolution even though passed on the same day as the convened meeting, is as efficacious as the other two resolutions passed at that meeting. Now, even if the allegation that no meeting was actually convened were true, the circular resolution *per se* would be sufficient to validate any determination made by the plaintiff's board of directors. However, from the evidence as contained in the plaintiff's affidavit, I am satisfied that there had been a properly convened meeting on 30 January 1996, which was preceded by the uncontroverted notice of such meeting dated 8 January 1996 (Exh. KPH7 to encl. 40). It is also my view that the circular resolution although valid, is superfluous, and in the circumstances completely unnecessary.

David Chai next questioned the validity of the ratification itself, as stated in the resolutions. His objection was as regards delay there being a long lapse from the time the suits were filed in 1986 to the date of ratification. He submitted further that the ratification was only borne out of his objection on the question of lack of authority thus, by implication, an afterthought. With respect, I cannot agree with learned Counsel's contention. When the oral challenge was initially made on 8 January 1996, this Court had decided that that challenge was unsupported by sufficient evidence for summary disposal and allowed a stay of proceeding for a formal challenge to be launched. As this was done by this motion filed on 20 January 1996, the Court finds that the ratification by the plaintiff on 30 January 1996, of the act of its former solicitor, and the employment of current solicitor was, in the circumstances, promptly made. As it is open to the defendant to launch the challenge at any time, it is also settled law that the plaintiff may equally ratify the act of its solicitor and gives further instruction at any time too; although it may be noted that, such ratification is not applicable restrospectively to acts done by a solicitor before the action was brought. The succinct and clear commentary in *Halsbury's Laws of England*, Fourth Edn. (Reissue), at para. 131, on this subject is reproduced herewith, in support:

> 131. **Requirement as to special authority**. A special authority is essential to entitle a solicitor either to commence an action in his client's name or to appear for and represent him as defendant in an action, or to take part, on his behalf, in any proceedings. It is, however, open at any time to a purported plaintiff to ratify the act of the solicitor who started the action, to adopt the proceedings and to instruct him to continue them.
>
> The authority is not retrospective so as to apply to acts done by the solicitor before the action was brought, if therefore, a solicitor who afterwards appears for a client in a suit has, before action is brought, written a letter making an admission, the admission cannot be taken advantage of in the subsequent action without further proof that the client authorised the communication.

The abovecited paragraph also answers Chai's submission that a ratification has no effect if the original act itself is without authority. Ratification, in its ordinary meaning means to confirm. Confirmation may be made of acts previously done without any authority. In law therefore a plaintiff may "adopt by ratification proceedings instituted without his authority (*Halsbury's Laws of England, ibid.*). The general rule is that such ratification relates back and is deemed equivalent to an antecedent authority. (See *Danish Mercantile Co. Ltd. and Ors. v. Beaumont and Anor.* [1951] 1 Ch. 680). In that case, the Court of Appeal also held that -

> ... It is, however, open at any time to the purported plaintiff to ratify the act of the solicitor who started the action, and to adopt the proceedings. When that

> has been done, then, in accordance with the ordinary law of principal and agent, and in accordance with the ordinary doctrine of ratification, the defect in the proceedings as originally constituted is cured, and it is no longer open to the defendant to object that the proceedings then ratified and adopted were in the first instance brought without proper authority.

Counsel for the challenger lastly contended that Yeow, Counsel for the plaintiff was authorised merely to act as its solicitor, not as Counsel. There is also, in my view, no merit in this contention. I need only revert to the resolution of 30 January 1996, which clearly shows that Yeow's appointment is also for the purpose of him conducting and prosecuting these suits. Perhaps it is also pertinent to mention that in our fused legal profession, lawyers who act as solicitors also appear as Counsels for their clients when the need arises. The term 'Counsel' refers to an advocate and solicitor in the context of the Legal Profession Act 1976 and Rules made thereunder. To appear as Counsel to conduct a case, a lawyer need not be specially authorised. If, as in this case, the client is also present in Court and does not object to him so appearing or express any limitation on his authority, the Court will, unless otherwise proven, assume that he is so authorised to appear. Lest it be forgotten, a Counsel also stands before the Court as its officer. His appearance must therefore, at first instance, be presumed to be regular and beyond reproach. The commentary in *Halsbury's Laws of England*, Fourth Edn. Reissue, Vol. 3(1) at para. 517, on this subject states:

> When Counsel appears in Court and states that he is instructed, the Court will not inquire into his authority to appear, nor as by whom he is instructed.

The plaintiff having been placed with the burden of proving that these suits had been instituted with proper authority (see *Syawal Enterprise Sdn. Bhd. v. Dayadiri Sdn. Bhd*. [1990] 3 MLJ 239) has satisfied the Court that this challenge is groundless. This motion is dismissed with costs.

David Chai intimated his intention to appeal this decision, and made an oral application to defer the trial pending the outcome of the appeal. This application is also refused, and an order for the trial to proceed on 14 June 1996 is made with a rider that it shall not prejudice the plaintiff's right to proceed with the appeal.

Reported by VT Singam